

Copyright & Fair Use

The purpose of the Copyright & Fair Use column is to keep readers informed on copyright as it affects the preservation and availability of historic recordings. Questions of general interest regarding copyright are welcome and will be addressed in these pages by an attorney (we cannot, however, offer private legal advice). Comments and short articles describing your own experiences with, and perspective on, copyright matters are also welcome. Please send your questions and submissions to Tim Brooks, Chair, ARSC Copyright & Fair Use Committee (tbroo@aol.com). For general information and reference material visit the Committee's web page at www.arsc-audio.org.

Recent Copyright News

By now most readers have heard about the surprising recommendations of the Gowers commission, which was appointed by the British government to recommend changes to British intellectual property law. To the consternation of the international recording companies Gowers recommended that Britain's 50-year copyright term for recordings *not* be extended to match the 95 year (or, because of loopholes, eternal) term in the U.S. An economic analysis commissioned by Gowers indicated that the optimal term for recordings is actually about 25 years, and concluded that "economic evidence indicates that the length of protection for copyright works already far exceeds the incentives required to invest in new works" (page 50). Longer terms benefit a very small number of entities at the expense of the many. The government has accepted the recommendation. The entire Gowers report is extremely well reasoned, highly factual, and worth reading. It is available as a free download at www.hm-treasury.gov.uk/gowers.

The recording companies have promised to move on to Brussels and lobby the European Union to override the British findings and impose a 95-year term throughout the EU, despite the fact that EU staff has already recommended against such an extension. This will be the next battleground. ARSC members should keep keenly apprised of developments in Brussels and make their opinions known. Public uproar, both local and international, made a difference in the U.K., and it could in Brussels as well. One of the more important filings with Gowers was by the British Library, which pointed out the potential damage to preservation by long copyright terms. Ben White, Copyright Compliance and Publisher Licensing Manager of the British Library, has submitted a fascinating essay on the effect of copyright on a particular project at the Library, to which we will devote the rest of this issue's column.

NO IDEA IS AN ISLAND

A Study of Rights Clearance of Sound Recordings by the British Library

The famous meditation by the 17th century English Poet John Donne “No man is an island” summarises for us the notion that man is interconnected. The same applies to the creative or inventive process. No work of creativity is made in isolation – we feed constantly off others, the information we have studied or the information that exists around us. Similarly to bring product to market often a whole series of interconnections with rights holders have to be established in order to ensure that the rights of copyright holders’ rights are not infringed. Imagine the job Apple would have had in launching iTunes if the record industry did not have a good grasp of the myriad rights involved in the three and a half million tracks Apple now offer for download.

The relative ease at which Apple could launch iTunes tells us that our copyright framework works at its best when dealing with well organised industry groups who represent, or actually are, a minority of well-known and visible artists. Although a gross over simplification, the more commercially successful a work is, usually the more visible an artist is and therefore the easier it is to be able to identify the rights holders, and therefore seek permission to use their work.

Intellectual Property is clearly important to our economy – in fact it is estimated 8% of our GDP is dependent on the creative industries. In addition to this the value that patented materials, such as pharmaceuticals, bring to our economy is also significant. There are also other values that IPR brings to our economy – and one important value is that of education. If one considers the value IPR has in this sector, some material used within academic circles will have high commercial value but if one thinks of the historical breadth of material available to modern day man, the value of the majority of material used in academia perhaps has little or low commercial value while still retaining high academic value. That is to say academic value and commercial value are in no way synonymous.

Our current copyright framework makes little differentiation between material with high commercial value and little or no financial value. The onus and requirement in copyright law to identify and receive clearance for use of a Beatles track in a television commercial is potentially the same as that of an academic wishing to put a recording of Andaman Island sea gypsy music on a university intranet.

The British Library has recently put up to 4000 hours of materials from its sound archive on an extranet for use by UK Higher Education and Further Education. While some of the eleven collections have high commercial value many of the archival sound project elements could be described as having little or no commercial value. But they do have high academic value for what they tell us about the world we have come from and the world we now live in. The project is unparalleled for the academic value it provides, and the way it is bringing audio material through the medium of the internet to the heart of academia.

The 11 collections range from unpublished musical histories of South Africa recorded from the 1960s to 80s, to interviews with Jazz musicians on themes such as the role of women in music, to a hundred years of Beethoven string quartet performances.

The collections are of course of high academic interest but the work behind putting the collection up on the web is also interesting for what it tells us about our copyright structure and the realities of rights clearance away from the commercial world of the well-regulated record industry.

The African Writers' Club collection comprises of over 250 hours of dramas, political discussions, and poetry readings made in the main by a company called the Transcription Centre in the 1960s and then broadcast by local radio stations in Africa. A small number of hours were produced and broadcast by the BBC World Service. The recordings include contributions from luminaries of 20th century African literature such as Wole Soyinka and Chinua Achebe and will bring a virtually unknown collection of recordings to researchers in academia.

The issues of making such a large audio collection available across the web are far too numerous for such a short article, but perhaps to summarise, the requirement to clear permissions for all forms of works (literary, musical, broadcast, performance and sound recording) while there in copyright law, is in actuality impossible. In fact, it would not be incorrect to say the various rights that exist and who owns them is for such a project of this type and magnitude in reality unknowable.

The collection was given to the British Library in the 1980s by one of the producers of the Transcription Centre who made most of the recordings. With the little paper work that came with it at the time even this fact was not known until research into the archival sound project began. Before this it was believed that the collection was made by the BBC World Service and only after some research did it become clear that this was not the case and the independent London-based production company, the Transcription Centre had made the majority of them.

The sound recording and broadcast rights were held by the BBC, and were relatively easy to clear, but this was not the case with the Transcription Centre who, while they held the sound recording rights did not hold the broadcasting rights as they had shipped them to Africa for initial broadcast. With little paperwork it was not possible to locate where they had been broadcast and therefore seek permission from the broadcast rights holders. Similarly, ascertaining the various literary, musical and performance rights involved in an environment where there is little information other than that held on the recording itself is complex and time consuming. In all it is estimated that 184 hours were spent on researching the permissions for the collection.

The African Writers Club collection comprises 250 hours of recordings, which equate to approximately 850 individual recordings. Before the outset of the project the collection had not been catalogued so all 250 hours had to be listened to by Library staff and infor-

mation relating to performers and possible literary readings and musical works acquired as was possible with no supporting documentation. Focussing on the literary right that may underlie a sound recording of course requires knowing that something is being read and not just spoken. This in reality is often difficult to know and the requirement for the literary right to be cleared underlying a sound recording, is very difficult indeed in such situations and one of the imponderables of our copyright law. When the recording is in a foreign language, as many of these reading are (Xhosa, Swahili, Hausa etc) the requirement to make a clearance is in most instances simply impracticable.

Within the recordings there are also small excerpts of published and unpublished music recordings, much traditional and again much unidentifiable. For this project a number of letters of agreement were sent out directly to musicians but as the majority were unidentifiable a small licence was taken out with MCPS-PRS who have links with music collecting societies throughout Africa, with the intention being that some of this money is distributed back to musicians in Africa – though of course being realistic it is highly unlikely that those on the recordings themselves will receive anything.

The British Library were able to identify from the recordings approximately 154 performers, in reality the real number is at the very least five times this number given that the total number of recordings reach approximately 850. The issue of how to clear permissions for the performers, artists and musicians many of whom are unidentifiable, are not in this country, for such a complex project is a huge challenge, and a challenge often faced by museums and libraries in the cultural sector.

As stated above a few of these recording involve famous literary figures of the day so approaches to their agents were made for the relevant literary or performance right, but these were very much the exception. In an attempt to contact the remaining performers and artists who were known the Writers Guild in London was contacted. Unsurprisingly they confirmed that none of the African writers or performers were on their books, and suggested that the South African Writers Guild was also contacted. This was duly done but no response was forthcoming.

Given the number of unknown rights holders on the project it was suggested that the British Library place an advert alerting rights holders to the archival sound project, through the Africa Centre, on Spectrum Radio. Spectrum radio broadcasts nationally and internationally and has a large audience amongst Britain's African ethnic communities and throughout Africa. As a result of the advert no further rights holders were traced. In addition to permissions from the BBC, the Transcription Centre, and MCPS-PRS (a blanket "African music" permission) in total to date the Library has been able to attain two permissions from performers – one of whom worked for the Transcription Centre itself.

Another collection that forms part of the archival sound project is the unpublished St Mary-le-Bow public debates collection. While these debates still continue today in the City of London, this collection comprises recordings made between 1964 and 1979 by the then rector of St Mary-le-Bow Church, Revered Joseph McCulloch. He invited well-known and less well-known figures within society to debate contemporary issues of the

day. The well-known interviewees included Sir John Betjeman discussing poetry, Enoch Powell on race, Germaine Greer on free will and Diana Rigg on single parenting. Less well known people included people working in the area who were involved in schools, education, architecture, health and the church.

Some of the debates included music and singing and while fully conscious of the effect it would have on the historical integrity of the collection, to simplify the rights clearance process, reduce cost and minimise the legal risk that the Library was exposing itself to, the decision was made not to include the musical performances.

When the recordings were made no contracts were signed at the time so the rights situation was unclear. This being the case an attempt was made to locate all potential performers. As with the African Writers Club it was unknown whether any of the performers were reading from a script, so whether a literary right required clearing also again was unknown. The Library was able to identify 299 rights holders in total whose permission was required, again some who were identifiable and some who were not.

The famous participants were easily traceable through agents or *Who's Who* and approached. Those less well known were traced in the main through the internet or through known addresses and employers at the time. Given the data protection act employers are unable to divulge personal details to seekers of rights holders so all that can be done is depend on an employer (in this case dating back thirty - forty years) to contact a rights holder for you. A number of performers were found to be deceased, and here the issue of approaching an "estate" that does not exist for most members of society in the way they do for the rich or famous has to be considered. In total 150 hours was spent by a freelancer and 152 hours by British Library staff to seek permissions, resulting in eight permissions being received.

Conclusion

The British Library's Archival Sound project has been enabled by the web, as without it academics and researchers would have had to come to the Library to listen to these collections. Listening to the original on the premises would not have required the lengthy permissions process but the act of copying and allowing downloads to remote users does, as the work is being made public and therefore "published".

It seems only common sense to presume that the number of online projects are likely to grow. In part we can see this with the populist digitisation programmes being undertaken by Google and Microsoft as well as the large historical corpuses that have been put online by the likes of Thomson and ProQuest in the last ten years. As part of the European Commission's i2010 programme there are also plans afoot to promote the digitisation of material that sits within libraries and museums.

For those involved in such large scale projects it is a well known fact that the costs of completing a best efforts permission process would prevent any commercial project ever being launched. The realities of large scale academic projects are that not only will a

large percentage of contributors never be found, a large number will be unidentifiable in the first place and even knowing whether rights exist and therefore need permission is also often in doubt. While representative groups such as collecting societies and guilds can have a role to play what this will be in the future is unclear as their traditional role as a representative of one constituency only is challenged by the multi-works environment of the web. Also as we can see with both these projects often rights holders of academic projects do not fall into the traditional neat categories of “artist”, “writer” or “musician” – the reality is they are from as many areas of society as we have an academic interest in.

The UK, US governments and the European Commission are currently looking at a solution for Orphan Works – works whose copyright holders cannot be traced. The US proposal for Orphan Works is interesting as it recognises the public good efforts of academic organisations like libraries and museums and the special situation they sit in as they hold vast amounts of educationally and culturally important material, much of which has high academic value but varying degrees of commercial worth.

From an economic perspective the high cost associated with the permissions process with the low lack of returns in the form of legal and therefore financial certainty is an inefficient one. In the context of large scale projects that have high academic value but little or no commercial value and which are publicly funded it would make sense to make a differentiation in the name of public interest. Much of the historical material that sits in our public institutions are not represented by rights holders, or their representatives in the way that the Beatles or the Rolling Stones are, and in the way that our copyright structure is formulated. Issues around identifying and tracing copyright owners are likely to become more complex in the age of the internet where everyone is a creator and everyone increasingly “mixes and mashes”. For this reason perhaps time is ripe for governments to give fresh thinking on the differences between types of value, and types of usage and how this should be reflected in our copyright regime. *Benjamin White, Copyright Compliance and Publisher Licensing Manager, British Library.*